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Group Art Unit: 2121
Confirmation No.: 9324
Examiner: Von Buhr, M.

Atty. Ref.: 6270/126

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicant : Douglas S. Ransom
Appl. No. : 10/666,398
Filed : September 19, 2003
For : PUSH COMMUNICATIONS ARCHITECTURE FOR INTELLIGENT
ELECTRONIC DEVICES

Mail Stop Petition
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313 1450

PETITION UNDER 37 C.F.R. § 1.183

Sir:

Pursuant to 37 C.F.R. § 1.183, E.I. Electronics, Inc., as an interested party (hereinafter "the Interested Party"), petitions the Director to Suspend the Rules, in particular, to suspend 37 CFR 1.59, 37 CFR 1.14, and other rules as the Director deems necessary, and to expunge pages 57-71 from "PowerCET Corporation: Patent Invalidity Search Report: REPORT OF RICHARD BINGHAM: Square D Co., et. al. v. E.I. Electronics, Inc., et. al.: Case no. 06-CV -5079: Dated June 18, 2009" (hereinafter "the Bingham Report"). The Bingham Report was submitted by Square D Company, the assignee of the above-captioned application (hereinafter "the Assignee") on August 11, 2009 and denoted as reference J91 on a Form 1449 submitted therewith.

The Interested Party and the Assignee are currently involved in a litigation in the United States District Court for Northern District of Illinois, Eastern Division,

entitled *Square D Company v. E.I. Electronics, Inc.*, Case No. 1:06-cv-05079 (hereinafter, "the pending litigation"). During the course of the above-cited litigation, the Assignee received from the Interested Party certain documents including highly-confidential, competitively-sensitive information which documents and/or information were subject to a Protective Order dated July 6, 2007 (see Appendix A, Exhibit A). On August 11, 2009, the Assignee submitted to the Patent and Trademark Office, as part of an Information Disclosure Statement (IDS), at least one document containing highly-confidential information. Specifically, the Assignee submitted an expert report of one of the Interested Party's technical experts, Richard Bingham, i.e., the Bingham Report.

The Interested Party had taken steps to move the United States District Court for Northern District of Illinois, Eastern Division, to enforce its July 6, 2007 Protective Order against the Assignee. A copy of the MOTION FOR RELIEF FROM SQUARE D'S VIOLATIONS OF THE STIPULATED PROTECTIVE ORDER filed with the Court on December 9, 2009 is attached hereto (see Appendix A, Exhibit B; other exhibits to the Motion have been excluded). The attached Motion details the effort the Interested Party had made in attempt to correct the violation of the Protective Order by the Assignee.

The Interested Party attaches to this Petition an Order of the United States District Court Northern District of Illinois, Eastern Division (see Appendix A, Exhibit C), signed on December 14, 2009. Magistrate Judge Keys issued the Order granting E.I.'S MOTION FOR RELIEF FROM SQUARE D'S VIOLATIONS OF THE STIPULATED PROTECTIVE ORDER. In part, the Order directs the Patent Office to expunge pages 57-71 of the Bingham Report from all Patent Office records, specifically Applications

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10/666,398, 11/2/4,706, 10/999,534, 11/899,769, 12/047,774 and Reexaminations
90/009,028, 90/009,006, and 09/009,039 [sic: 90/009,039].

This Petition under 37 C.F.R. § 1.183 is being accompanied by the fee set forth in 37 CFR 1.17(f). The Director is authorized to charge any fee deficiency associated with the filing of this Petition to Deposit Account 03-1030.

In view of the preceding remarks and the attached Order, it is respectfully requested that pages 57-71 of the identified paper (i.e., the Bingham report) be expunged from the file history of the above-captioned application in accordance with the December 14, 2009 Order and the July 8, 2007 Protective Order. The Examiner or Office of Patent Legal Administration is urged to contact the Interested Party's attorney at the number below if they believe a telephone or personal interview would facilitate the rectification of this matter.

I hereby declare that all statements made herein of my own knowledge are true and that all statements made on information and belief are believed to be true, and further that these statements were made with the knowledge that willful false statements and the like so made are punishable by fine or imprisonment, or both, under Section 1001 of Title 18 of the United States Code.

Respectfully submitted,



Gerald E. Hespos, Esq.

Atty. Reg. No. 30,066
Customer No. 01218
CASELLA & HESPOS LLP
274 Madison Avenue - Suite 1703
New York, NY 10016
Tel. (212) 725-2450
Fax (212) 725-2452

Date: December 21, 2009

EXHIBIT A

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISIONSQUARE D COMPANY,
POWER MEASUREMENT, INC., and
POWER MEASUREMENT, LTD.

Plaintiffs,

- vs. -

E.I. ELECTRONICS, INC. and
E.I. ELECTRONICS, LLC

Defendant.

No. 06 CV 5079

District Judge
Samuel Der-YeghiayanMagistrate Judge
Arlander Keys**[PROPOSED] STIPULATED PROTECTIVE ORDER**

Plaintiffs Square D Company, Power Measurement, Inc., and Power Measurement, Ltd. and Defendants, E.I. Electronics, Inc. and E.I. Electronics, LLC (collectively, the "Parties") recognize that some of the documents, testimony and materials which will be produced by the Parties and by certain third parties may include information which is or is claimed to be proprietary, trade secrets, know-how or otherwise confidential, technical, commercial or financial information. Accordingly, the Parties wish to establish rules and procedures governing the treatment of such information, and have conferred in good faith with respect to the terms of this Protective Order pursuant to Fed. R. Civ. P. 26(c). The production of information which a Party or a third-party contends includes proprietary, trade secrets, know-how or otherwise confidential, technical, commercial or financial information shall be governed by the following Stipulated Protective Order ("Protective Order").

Therefore, it is hereby stipulated and agreed by and between the Parties to this action, through their respective counsel, subject to approval by the Court, that:

I. Proceedings And Form Of Information Covered

This Protective Order shall govern any type or classification of information, whether it be contained or constituted in a document, part of a document, a physical object or items or other information gained by inspection of any tangible thing, or information which is in the possession or subject to the control or access of any Party, including data or code stored in electronic form, or set forth or contained in any paper filed with the Court during the course of this litigation, or revealed or disclosed during the course of a deposition, in an answer to an interrogatory, in a response to a request to admit or in any other form of evidence or discovery contemplated under Rules 26 through 37 and 45 of the Federal Rules of Civil Procedure which is designated as containing "Confidential Information" as defined herein, and is furnished, served, or obtained by any Party or non-party to any Party in connection with this action. Any document or form of evidence or discovery as set forth above, or any portion thereof, may be designated Confidential Information.

II. Scope And Definitions

A. The scope of this Protective Order shall be understood to encompass not only those items or things that are expressly designated as Confidential Information, but also any information derived therefrom, and all copies, electronic files, excerpts and summaries as well as testimony and oral conversation related thereto.

B. The term "Confidential Information" shall be interpreted to mean information that is confidential and/or proprietary to the producing party. Such information may include, but is not limited to: technical, research, development information; engineering drawings, code, or test data; commercial, financial, budgeting, or accounting information; existing and potential customer information; sales, revenue, margins, profit or cost of production information; marketing

studies, performance data, and projections; business strategies, decisions, or negotiations; personnel compensation, evaluations, or other employment information; and information about affiliates, parents, subsidiaries, and third parties with whom the Parties to this action have had actual or potential business relationships.

C. The term "Party" shall be interpreted to mean any party to this action, including all of its officers, directors, inhouse counsel, employees, consultants, retained experts, and outside counsel and their support staff. The term "Designating Party" shall be interpreted to mean a Party or non-party that designates documents or things that it produces in disclosures or in responses to discovery as "CONFIDENTIAL UNDER PROTECTIVE ORDER" or "CONFIDENTIAL UNDER PROTECTIVE ORDER - ATTORNEYS EYES ONLY."

III. Designation Of Confidential Information

A. Any person shall have the right, before disclosure to other parties, to designate as "CONFIDENTIAL UNDER PROTECTIVE ORDER" or "CONFIDENTIAL UNDER PROTECTIVE ORDER - ATTORNEYS EYES ONLY" any information it believes constitutes, reflects, or discloses its trade secrets or other confidential research, development, or commercial information within the scope of Rule 26(c)(7) of the Federal Rules of Civil Procedure. Confidential Information shall be so designated by marking or stamping such material "CONFIDENTIAL UNDER PROTECTIVE ORDER" or "CONFIDENTIAL UNDER PROTECTIVE ORDER - ATTORNEYS EYES ONLY" at such time as the material is disclosed or when the person becomes aware of the nature of the material disclosed and sought to be protected and re-designates such information as Confidential Information as provided for in ¶ 11(F).

B. Documents or things designated as "CONFIDENTIAL UNDER PROTECTIVE ORDER - ATTORNEYS EYES ONLY" shall be limited to source code, firmware, source code

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specifications, source code summary documents, software block diagrams, hardware schematics, documents showing hardware design, parts lists or bills of material, hardware specifications, hardware block diagrams, and sales and marketing documents containing sensitive competitive information. See, e.g., *Citizens First Nat'l Bank of Princeton v. Cincinnati Ins. Co.*, 178 F.3d 943 (7th Cir. 1999).

C. The existence of this Protective Order may be disclosed to any person producing documents, tangible things, or testimony in this action who may reasonably be expected to desire confidential treatment for such documents, tangible things, or testimony. Any such person or any Party may designate appropriate documents, tangible things, or testimony produced by such persons or Parties as Confidential Information pursuant to this Protective Order.

D. It shall be the duty of the Party seeking protection of Confidential Information to indicate those materials and testimony that are to be considered Confidential Information to the receiving Party.

E. The restrictions on the use of Confidential Information established by this Protective Order are applicable only to the use of Confidential Information received by a Party from another Party or from a non-party. A Party is free to do whatever it desires with its own Confidential Information.

F. Each Party retains the right subsequently to re-designate documents and information and to require such documents and information to be treated in accord with its re-designation from the time the receiving Party is notified in writing of such re-designation. A Party may rely on and act in accordance with the original designation of documents and information without penalty until the time of the subsequent re-designation.

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G. The inadvertent or unintentional disclosure of Confidential Information by the Designating Party, regardless of whether the information was designated Confidential Information at the time of disclosure, shall not be treated as a waiver in whole or in part of a Designating Party's claim of confidentiality, either as to the specific information disclosed or as to any other information on the same or a related subject.

H. Inadvertent production of privileged or attorney work-product material shall not be deemed a waiver of any attorney-client privilege or attorney work-product immunity that may apply thereto. Upon request, the receiving party shall promptly return the inadvertently produced material.

IV. Use Of Confidential Information Generally

A. Information designated as Confidential Information obtained pursuant to discovery in this action shall be subject to this Protective Order. Such Confidential Information may be used only in connection with this action, and may not be used for any other litigation or business, commercial, competitive, personal, or other purpose whatsoever. Such Confidential Information shall be held in confidence by each person to whom it is disclosed, and may not be disclosed to any person or entity, except as permitted by this Protective Order. All produced Confidential Information shall be carefully maintained by the receiving Party in secure facilities and access to such Confidential Information shall be permitted only to persons having access thereto under the terms of this Protective Order. Confidential Information shall be kept to the level of confidentiality, as designated by the Designating Party as set forth in ¶¶ III (A) and (B).

V. Disputes Regarding Designation Of Confidential Information

A. If at any time during the pendency or trial of this action, any Party or non-party objects ("Objecting Party") to the designation of Confidential Information, the Objecting Party

may so inform the Designating Party by serving a captioned notice of objection on all Parties and affected entities, identifying the specific document or thing as to which the designation is challenged, stating the basis for each challenge, and proposing a new designation for such materials. The Objecting Party and Designating Party shall promptly meet and confer in a good faith effort to resolve the dispute.

B. In the event that the Designating Party does not re-designate the materials within five (5) business days after service, the Objecting Party may file and serve a motion seeking an order that such materials be re-designated. The burden of establishing that information has been properly designated as Confidential Information is on the Designating Party. The challenged designation shall remain in effect unless and until amended by entry of an order of the Court re-designating the materials. The failure of any party or non-party to challenge any designation by any other party or non-party shall not constitute a waiver of the right to challenge the designation at a later time nor an admission of the correctness of the designation.

C. Outside counsel for a non-Designating Party shall have the right to assert that any information designated confidential is, in fact, in the public domain. Any information which, prior to its disclosure hereunder, is either in the possession or knowledge of a non-Designating Party or person who, absent this Protective Order, is under no restriction with respect to the dissemination of such Confidential Information, or is public knowledge or which, after disclosure, becomes public knowledge other than through an act or omission of a Party receiving the information designated as confidential, shall be deemed to be in the public domain. A non-Designating Party or person asserting that designated Confidential Information is in the public domain shall, prior to any disclosure of such information (other than is provided by this Protec-

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tive Order), either obtain the written approval of the Designating Party or the approval of the Court to make such disclosure.

VI. Access To "Confidential Under Protective Order" Information

A. Access to Confidential Information designated "CONFIDENTIAL UNDER PROTECTIVE ORDER" shall be limited to the following Qualified Persons:

1. Outside attorneys of record to any Party in connection with this action and, if the attorney is a member of a law firm, the employees and staff of the law firm acting in secretarial, clerical, and paralegal capacities who provide assistance to outside attorneys of record. Before any such person is permitted access to any of the Confidential Information, such person shall be informed of the existence and contents of this Protective Order and shall agree to comply with its terms.

2. Members of third-party vendors retained by the outside attorneys of record to provide litigation and trial support services in this action. Before any such person is permitted access to any of the Confidential Information, such person shall execute the form attached as Exhibit A to this Protective Order and follow the procedures outlined in Section VIII.

3. Consultants and experts and their staff not regularly employed by or associated with a Party who are employed for purposes of this litigation, except that before any such consultant or expert is permitted access to any of the Confidential Information, such person shall execute the form attached as Exhibit A to this Protective Order and follow the procedures outlined in Section VIII.

4. Persons taking testimony involving Confidential Information, including stenographers, videographers, and clerical personnel thereof.

5. The Court and the Court's staff.

6. One (1) designated client representative. Before any such person is permitted access to any of the Confidential Information, such person shall execute the form attached as Exhibit A to this Protective Order and follow the procedures outlined in Section VIII.

7. Such other persons as hereafter may be designated Qualified Persons by prior written agreement of the Parties in this action or by order of the Court. The written agreement shall specify whether the designated Qualified Person is permitted access to Confidential Information marked "CONFIDENTIAL UNDER PROTECTIVE ORDER" and/or "CONFIDENTIAL UNDER PROTECTIVE ORDER - ATTORNEYS EYES ONLY." Before any such person is permitted access to any of the Confidential Information, such person shall execute the form attached as Exhibit A to this Protective Order and follow the procedures outlined in Section VIII.

B. All materials containing Confidential Information marked "CONFIDENTIAL UNDER PROTECTIVE ORDER" shall be maintained at a location and under circumstances to ensure that access is limited to those persons entitled to have access under this Protective Order.

VII. Access To "Confidential Under Protective Order - Attorneys Eyes Only"

A. Access to information marked "CONFIDENTIAL UNDER PROTECTIVE ORDER - ATTORNEYS EYES ONLY" shall be limited to the Qualified Persons identified in ¶¶ VI(A)(1), (2), (3), (4), and (5). If the parties agree by written agreement, Qualified Persons under ¶ VI(A)(7) shall also have access to information marked "CONFIDENTIAL UNDER PROTECTIVE ORDER - ATTORNEYS EYES ONLY."

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D. All materials containing Confidential Information marked "CONFIDENTIAL UNDER PROTECTIVE ORDER - ATTORNEYS EYES ONLY" shall be maintained at a location and under circumstances to ensure that access is limited to those persons entitled to have access under this Protective Order.

VIII. Disclosure Of Confidential Information

A. Before a Party may disclose any document, information or material designated as Confidential Information to any individual or entity contemplated herein, each individual or entity, except Qualified Persons under ¶ VI(A)(1), (4), and (5), shall acknowledge in writing under penalty of perjury in the form attached hereto as Exhibit A that he/she has been informed of this Protective Order and that:

1. The signatory has read and understands this Protective Order and has been given a copy of it. The signatory agrees to comply with and be bound by its terms in all respects.
2. The signatory understands that disclosure of Confidential Information, other than as provided herein, may constitute contempt of Court.
3. The signatory consents to the exercise of personal jurisdiction by this Court for the purposes of any adjudication regarding his/her compliance with the Protective Order.

D. The form attached hereto as Exhibit A shall be executed by the individual or entity to whom the Party wishes to disclose Confidential Information. A copy of the executed form shall be provided by the Party to the other Party and shall allow the other Party five (5) business days in which to object thereto. No Confidential Information shall be provided to the individual or entity during the five (5) business days following a timely objection or the time the copy of

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the executed Exhibit A form is provided to the other Party. In the event a Party objects to the individual or entity during the five (5) business days following the time the copy of the executed Exhibit A form is provided to it, the objecting Party shall serve a captioned written notice of objection identifying with particularity the basis for its objection to the individual or entity. If the Parties are unable to resolve the objection, the objecting Party may file a motion for an Order preventing the disclosure of information within five (5) business days after such objection is made. The burden of proving harm or supporting the objection is on the objecting Party. Following the filing of a timely motion for an order preventing the disclosure of information, unless and until the motion is withdrawn or until the Court enters an Order to the contrary, no Confidential Information shall be disclosed to the individual or entity. The failure of a party to object to the individual or entity within (5) business days following the time the copy of the completed Exhibit A form is provided to it shall be deemed approval by that party to the designation of the person to whom the identified Confidential Information may be disclosed.

D. If a receiving Party is served with a subpoena or a court order that would compel disclosure of any information, documents, or things designated in this action as Confidential Information, the receiving Party must notify the Designating Party, in writing promptly and in no event more than ten (10) calendar days after receiving the subpoena or court order. Such notification must include a copy of the subpoena or court order. The receiving Party must also immediately inform in writing the party who caused the subpoena or court order to issue that some or all the material covered by the subpoena or court order is the subject of this Protective Order. In addition, the receiving Party must deliver a copy of this Protective Order promptly to the party in the other action that caused the subpoena or court order to issue.

IX. Use Of Confidential Information In This Action

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A. Confidential Information may be used by the outside attorneys of record in good faith in conducting discovery, provided that the Confidential Information is protected pursuant to the terms and conditions of this Protective Order.

B. During the course of any deposition, upon any inquiry about the content of a document or thing marked "CONFIDENTIAL UNDER PROTECTIVE ORDER" or "CONFIDENTIAL UNDER PROTECTIVE ORDER - ATTORNEYS EYES ONLY," or when outside counsel for a person (Party or non-party) deems in good faith that the answer to a question may result in the disclosure of Confidential Information within the meaning of this Order, outside counsel for the person whose information is involved may direct that the transcript, or portion thereof, of the questions and answers be marked as "CONFIDENTIAL UNDER PROTECTIVE ORDER" or "CONFIDENTIAL UNDER PROTECTIVE ORDER - ATTORNEYS EYES ONLY." When such a direction has been given, the disclosure of the testimony shall be limited in the manner specified in hereof, and the information contained therein shall not be used for any purpose other than as provided in this Order. Outside counsel for the person whose Confidential Information is involved may also request that all persons other than the court reporter, videographer, outside counsel and individuals authorized hereof leave the deposition room during the confidential portion of the deposition. The designation of Confidential Information may also be made in writing within ten (10) days after receipt of the transcript of the deposition by the Party whose Confidential Information has been disclosed. A Party may rely and act in accordance on the original designation of deposition transcript without penalty until the time of the subsequent re-designation.

C. Pursuant to the prior approval of the Court, all information designated as Confidential Information which is filed or lodged with the Court shall be filed or lodged in sealed en-

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velopes on which shall be affixed a copy of the cover page of the document contained therein. The cover page shall include the words "CONFIDENTIAL UNDER PROTECTIVE ORDER" or "CONFIDENTIAL UNDER PROTECTIVE ORDER - ATTORNEYS EYES ONLY" as appropriate.

X. Disclosure To Author, Addressee, Or Recipient

Nothing herein shall prohibit a Party or its outside counsel from disclosing a document which contains Confidential Information to the person who, on the face of the document, is an author, addressee, or recipient of such document, or who can be established by the Party to have actually received such document during the time period of the occurrences alleged in the pleadings. No person to whom disclosure is made pursuant to this provision shall make or be given a copy of the disclosed document to retain. Such person shall be permitted only to inspect a copy of the disclosed document and prepare handwritten notes; no other method of preparing notes is permitted.

XI. Advice To Clients

Nothing in this Protective Order shall bar or otherwise restrict any outside attorney from rendering advice to his or her client with respect to this litigation and, in the course of rendering advice, referring to or relying generally on the examination of Confidential Information produced or exchanged; provided, however, that in rendering such advice and in otherwise communicating with his or her client, the outside attorney shall not disclose the specific contents of any Confidential Information produced by another Party if that disclosure would be contrary to the terms of this Protective Order. Further, nothing in this Protective Order prevents any outside attorney from advising his or her clients regarding general strategy so long as the outside attorney

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does not disclose the specific contents of any Confidential Information in a manner contrary to the terms of this Protective Order.

XII. No Waiver

Other than as specified herein, the taking of or the failure to take any action to enforce the provisions of this Protective Order, or the failure to object to any designation or any such action or omission, shall not constitute a waiver of any right to seek and obtain protection or relief in this action or any other action, such right including, but not limited to, the right to claim that any information is or is not proprietary to any Party, is or is not entitled to particular protection, or that such information does or does not embody the trade secrets of any Party. The procedures set forth herein shall not affect the rights of Parties to object to discovery on grounds other than those related to trade secrets or proprietary information claims, nor shall it relieve a Party from the duty to respond properly to a discovery request.

XIII. No Probative Value

The fact that information is designated "Confidential Information" under this Protective Order shall not be deemed to be determinative of what a trier of fact may determine to be confidential or proprietary. Provided that a Party complies with the procedures outlined herein, this Order shall be without prejudice to the right of any Party to bring before the Court the questions of (a) whether any particular information or material is or is not confidential; (b) whether any particular information or material is or is not entitled to a greater or lesser degree of protection than provided hereunder; or (c) whether any particular information or material is or is not relevant to any issue of this case. The fact that any information is disclosed, used or produced in discovery or trial herein shall not be deemed admissible, nor offered in any other action or proceed-

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ing before any court, agency, or tribunal as evidence of or concerning whether such information is confidential or proprietary.

XIV. Sealing of Trial Record

In the event this litigation proceeds to trial, the Court shall be permitted to make its own determination whether to seal the entirety or portions of the trial record. *See, e.g., Citizens First Nat'l Bank of Princeton v. Cincinnati Ins. Co.*, 178 F.3d 943 (7th Cir. 1999).

XV. Termination Of Litigation

Within sixty (60) days of the final and unappealable disposition of the above-captioned case, whether by judgment and exhaustion of all appeals, by dismissal of all claims at issue in this case, or by settlement, the outside counsel of record shall destroy or return to the disclosing Party, or its outside counsel of record, the Confidential Information in their possession, custody, or control or in the possession, custody or control of their staff; provided however, outside counsel for each Party shall be permitted to retain and archive Confidential Information that is contained in files ordinarily maintained in the course of litigation, including without limitation deposition transcripts and exhibits, all documents filed with the Court, discovery, attorney notes and memoranda; shall insure that all the Confidential Information in the possession, custody or control of their experts, is destroyed or returned to the disclosing Party, or its outside attorney of record; shall consent to the Court's destruction of such Confidential Information. Notwithstanding any of the foregoing, any outside counsel for Party may retain copies of any material filed with the Court, including material containing Confidential Information.

XVI. Enforcement Of Protective Order

This Protective Order shall survive the final conclusion of the action and the Court shall have jurisdiction to enforce this Order beyond the conclusion of this action. The provisions of

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this Protective Order apply to all proceedings in this litigation, including all appeals, arbitrations, settlement proceedings, and proceedings on remand.

XVII. Modification Of Protective Order

In the event any Party seeks a court order that in any way seeks to vary the terms of this Protective Order, the moving Party shall make such request in the form of a written stipulation or noticed motion to all Parties that must be served and filed in accordance with local court rules.

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STIPULATED AND AGREED TO:

E.I. ELECTRONICS, INC. and
E.I. ELECTRONICS, LLC

SQUARE D COMPANY;
POWER MEASUREMENT, INC.; and
POWER MEASUREMENT, LTD.

By: s/ Jeffrey H. Dean
One Of Their Attorneys

By: s/ Renee L. Zipprich
One Of Their Attorneys

Bradford P. Lycia
Jeffrey H. Dean
Michelle Armond
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Allan J. Sternstein
Timothy M. Morella
Renee L. Zipprich
DYKEMA GOSSETT PLLC
10 South Wacker Drive
Suite 2300
Chicago, Illinois 60606-7509
312 876 1700

Kareem M. Irfan
SQUARE D COMPANY
1415 South Roselle Road
Palatine, Illinois 60067
847 925 3455

ORDER

IT IS SO ORDERED.

Dated: July 6, 2007

Arlander Keys
Magistrate Judge Arlander Keys

Dec. 21. 2009 1:22PM

No. 2621 DEC 22 2009

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EXHIBIT A

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

SQUARE D COMPANY,
POWER MEASUREMENT, INC., and
POWER MEASUREMENT, LTD,

Plaintiffs,

- vs. -

F.I. ELECTRONICS, INC. and
F.I. ELECTRONICS, LLC

Defendant.

No. 06 CV 5079

District Judge
Samuel Der-Yeghiayan

Magistrate Judge
Arlander Keys

ACKNOWLEDGEMENT OF PROTECTIVE ORDER

My name is _____ My home address is _____

I am employed as (position) _____

at (name and address of employer) _____

1. I have read and understand the Stipulated Protective Order and a copy of it has been given to me. I agree to comply with and be bound by its terms in all respects.

2. I understand that disclosure of Confidential Information, other than as provided in the Stipulated Protective Order, may constitute contempt of Court.

3. I consent to the exercise of personal jurisdiction by this Court for the purposes of any adjudication regarding my compliance with the terms of this Stipulated Protective Order.

I declare under the penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Date: _____

Executed at: _____

Signed: _____

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CERTIFICATE OF SERVICE

I hereby certify that on July 6, 2007, I electronically filed the foregoing [Proposed] Stipulated Protective Order with the Clerk of the Court using the ECF system, which sent electronic notification of the filing on the same day to:

Bradford P. Lyerla (blyerla@marshallip.com)
Marshall, Gerstein & Borun
233 South Wacker Drive
6300 Sears Tower
Chicago, IL 60606-6357
(312) 474-6300

Jeffrey H. Dean (jleam@marshallip.com)
Marshall, Gerstein & Borun
233 South Wacker Drive
6300 Sears Tower
Chicago, IL 60606-6357
(312) 474-6300

s/ Timothy M. Morella

CTDC AUG 10 2009 13:1
LDCAM1

EXHIBIT B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SQUARE D COMPANY,)	
POWER MEASUREMENT, INC., and)	
POWER MEASUREMENT, LTD.)	Case No. 06cv5079
)	
Plaintiffs,)	Magistrate Judge Arlander Keys
)	
vs.)	
)	
E.I. ELECTRONICS, INC. and)	
E.I. ELECTRONICS, LLC,)	
)	
Defendants.)	
)	

**MOTION FOR RELIEF FROM SQUARE D'S VIOLATIONS OF THE STIPULATED
PROTECTIVE ORDER**

Defendants E.I. Electronics, Inc. and E.I. Electronics LLC ("EI") moves the Court to enforce its July 6, 2007 Stipulated Protective Order against Square D Company, Power Measurement, Inc. and Power Measurement, Ltd. ("Square D") and the United States Patent and Trademark Office ("Patent Office" or "PTO") as follows:

NATURE OF THE MOTION

1. EI brings this Motion because Square D has knowingly and wrongfully violated the Court's Stipulated Protective Order ("the Protective Order") by submitting highly confidential competitively sensitive information produced by EI in this litigation to the Patent Office where it has been accessible to the public on the PTO's website. This information includes highly confidential source code for the firmware of many EI products. Square D made its improper disclosures by submitting the expert report of one of EI's technical experts, Richard Bingham, to the PTO, contrary to the PTO's own rules, in an apparent attempt to "whitewash" Mr. Bingham's report before trial in this case. EI seeks immediate relief to protect its

confidential source code and to prevent further misconduct by Square D and its counsel as described further below.

2. EI brings this motion after multiple telephone conferences, correspondence including many emails, and face-to-face conversations, all of which was abruptly and unilaterally terminated by Square D last night, December 8, 2009, in a letter described below. EI's efforts to resolve this issue amicably through numerous attempts to meet and confer as required by this Court's standing order have been unavailing as described further below.

STATEMENT OF FACTS

3. On July 6, 2007, the Court signed the Protective Order which had been stipulated to earlier by the parties. The Protective Order is attached hereto as Exhibit A. The Protective Order provides that the parties may designate discovery information as confidential or confidential – attorneys eyes only. Materials designated under the Protective Order are to be treated as secret and are not to be disclosed except as specifically permitted under the Protective Order. The Protective Order provides in pertinent part:

III. B. Documents or things designated as "CONFIDENTIAL UNDER PROTECTIVE ORDER ATTORNEYS EYES ONLY" shall be limited to source code, firmware, source code specifications, source code summary documents, software block diagrams, hardware schematics, documents showing hardware designs, parts lists or bills of material, hardware specifications, hardware block diagrams, and sales and marketing documents containing sensitive competitive information. *See, e.g., Citizens First Nat'l Bank of Princeton v. Cincinnati Int. Co.*, 178 F.3d 943 (7th Cir. 1999).

* * *

III. F. Each Party retains the right subsequently to re-designate documents and information and to require such documents and information to be treated in accord with its re-designation from the time the receiving Party is notified in writing of such re-designation. A Party may rely on and act in accordance with the

original designation of documents and information without penalty until the time of the subsequent re-designation.

+ + +

IV.A. Information designated as Confidential Information obtained pursuant to discovery in this action shall be subject to this Protective Order. Such Confidential Information may be used only in connection with this action, and may not be used for any other litigation or business, commercial, competitive, personal, or other purpose whatsoever. Such Confidential Information shall be held in confidence by each person to whom it is disclosed, and may not be disclosed to any person or entity, except as permitted by this Protective Order. All produced Confidential Information shall be carefully maintained by the receiving Party in secure facilities and access to such Confidential Information shall be permitted only to persons having access thereto under the terms of this Protective Order. Confidential Information shall be kept to the level of confidentiality, as designated by the Designating Party as set forth in ¶¶ III (A) and (B).

4. On June 18, 2009, EI exchanged initial expert reports with Square D. EI transmitted to Square D's counsel three expert reports. One of these reports was prepared by EI's technical expert, Richard Bingham ("the Bingham Report"). The Bingham Report is submitted with this Motion as Exhibit B. Because of its confidential nature, Exhibit B is submitted under seal.

5. In his report, Mr. Bingham opined that the asserted claims in Square D's '562, '138, '428, '508, '364 and '934¹ patents are invalid. The Bingham Report relied, in significant part, on EI's own prior art. See Exhibit B, pp. 57-71. That is, the Bingham Report described power meters that EI had manufactured and sold in years prior to the issuance of the Square D patents and described how those EI power meters anticipated or made obvious the claims asserted by Square D from its patents. In particular, the Bingham Report discloses a great deal

¹ U.S. Patent Nos. 6,751,562; 6,745,138; 5,831,428; 6,185,508; 6,792,364; and 7,006,934, respectively.

of source code found in the firmware of the prior art EI products.

6. In Defendant's Rule 26(a)(2) Disclosure Statement, which served as the cover page and transmittal document for the Bingham Report, EI stated: "The attached expert reports are hereby designated HIGHLY CONFIDENTIAL under the Protective Order." See Exhibit C, p. 2, fn 2, attached hereto.

7. Five weeks later, on July 27, 2009, with no notice to EI, Square D's counsel provided a copy of the highly confidential Bingham Report to the Patent Office. Square D asked that the Bingham Report be made a part of the public record in the Patent Office's ongoing *ex parte* reexamination of the validity of Square D's '562 patent. The request is improper for two reasons. First, in a reexamination, an expert's report is not appropriate subject matter under PTO rules.² Second, and as the basis for the instant Motion, the Bingham Report is confidential and restricted under the Protective Order and may not, under any circumstance, be given to the PTO.

8. On October 21, 2009, counsel for Square D sent EI's counsel an email, which did not disclose that the Bingham Report had been submitted to the Patent Office, but inquired whether it is EI's position that the expert reports are confidential under the Protective Order. The October 21, 2009 email is attached hereto as Exhibit E. In pertinent part, Square D's email stated:

² Expert reports are not appropriate subject matter for consideration in a reexamination per PTO rules. For example, Square D submitted, in addition to Bingham's report, another of EI's expert reports in the *ex parte* reexamination of the '842 patent. This additional report was prepared by a technical witness named Robert McCabe who is an expert on soldering electrical components to PCB boards. He opined that Square D's '842 and '211 patents are invalid. Though the McCabe Report contained no confidential information, the Patent Office *sua sponte* expunged the McCabe Report from the '842 reexamination because such a report is not proper subject matter for consideration in a reexamination. A copy of the Patent Office's decision is attached as Exhibit D. EI received notice of this decision (and that the McCabe Report had been submitted to the PTO) almost simultaneously with Square D's disclosure *infra* that it had submitted the Bingham Report to the Patent Office.

"We have assumed that EI's reports on invalidity and unenforceability are non-confidential, as we can't imagine what confidential information could be contained therein. However, we just noticed the footnote in your Rule 26 disclosure, indicating that those reports are designated "Highly Confidential." Could you confirm you(s/te) intentions with respect to that designation (as it is not defined in the Protective Order) and clarify EI's position with respect to these reports."

9. In a telephone call on October 29, 2009, EI's counsel confirmed to Square D's counsel that EI designates the Bingham Report as "Attorneys Eyes Only Confidential" under the Protective Order. See Exhibit A, III. B. This was confirmed in an email to Square D's counsel on October 29, 2009, which is attached hereto as Exhibit F.

10. In response to EI's confirmation that the Bingham Report is Confidential Attorneys Eyes Only under the Protective Order, Square D did three things:

- i. it disclosed that the Bingham Report had been submitted to the Patent Office as a public document;
- ii. it confirmed via email to EI's counsel that the Bingham Report had not been disclosed to any person at Square D except Kareem Lifa (who, although an in-house lawyer at Square D, has filed an appearance in this litigation); and
- iii. it committed to file a petition in the '562 reexamination, and seven other applications and reexaminations, to expunge pages 57-71 of the Bingham Report (i.e. the pages disclosing EI's confidential source code) from the PTO's records so that those pages of the Bingham Report would not become public and would remain confidential. See Exhibit G, email from Steven Zeller to Benjamin Horton, October 29, 2009.

11. On November 2, 2009, as it had agreed to do, Square D filed a Petition to Expunge ("Petition") in the reexamination of the '562 patent. A copy is attached as Exhibit H. In pertinent part, the Petition represented to the Patent Office:

On July 6, 2009 [Square D's] litigation counsel transmitted a copy of the Bingham Report to [Square D's] prosecution counsel (the "prosecution counsel") without any indication that any portion of the Bingham Report was subject to a protective order. On July 27, 2009, the prosecution counsel filed a Third Supplemental Information Disclosure Statement, which cited and provided a copy of the Bingham Report and references disclosed therein. Neither the Bingham Report nor any section therein were submitted in a sealed envelope as discussed in MPEP § 724.02 because the prosecution counsel was unaware of any protected information in the Bingham Report. On October 28, 2009, [Square D's] litigation counsel notified the prosecution counsel that pages 57-71 of the Bingham Report included information that was subject to a protective order. Accordingly, the prosecution counsel is attempting to expunge the confidential information, which was submitted in an information disclosure statement but inadvertently not submitted in a sealed envelope . . . by filing this Petition to Expunge.

Exhibit H, p. 2.

12. EI is advised that, as a result of the filing of Petition, the Patent Office is temporarily holding the Bingham Report as confidential and it currently is not available to the public in the record of that proceeding. However, EI is advised that this treatment of the Bingham Report may end on December 12, 2009 if the Court does not grant the instant Motion.

13. On November 9, 2009, Square D notified counsel for EI via email that the PTO legal advisor had advised Square D's patent prosecution counsel that the submitted Petition to Expunge was not a suitable method for protecting EI's confidential information. Square D explained that a Petition to Expunge ordinarily is filed at the end of a reexamination and, thus, Square D's Petition was premature in the eyes of the Patent Office. This email is attached as Exhibit I. In this email, Square D proposed an alternative to the Petition to Expunge which would seal the Bingham Report to allow the Patent Office Examiner to have access to the confidential information, but not the public. See Exhibit I.

14. On November 12, 2009, counsel for Square D advised EI's counsel via email that

the alternative it proposed on November 9, 2009 might not work. This email is attached as

Exhibit J and provides in pertinent part:

Apparently I was misinformed. [Square D's prosecution counsel] clarified this with the [PTO] legal advisor today. While the original report will be destroyed, there is a possibility that the sealed version would be "unsealed" and put into the public file of the patent for which it was submitted in(sic).

* * *

[the legal advisor] also said that short of a court order, there is little we can do to completely remove the document from the record.

See Exhibit J.

15. On November 13, 2009, counsel for EI wrote to Square D's counsel, attached hereto as Exhibit K, stating in pertinent part:

Your November 12, 2009 email confirms that there is a possibility that this confidential information will be disclosed to the public unless a court order directing the Patent Office to expunge the record is obtained. Under these circumstances, including the unavailability of a satisfactory corrective measure in the Patent Office, we feel that such an order is appropriate and necessary.

Specifically, I suggest that we move Judge Keys jointly to order the Patent Office to expunge the materials as the natural enforcement of his Protective Order. If Square D will agree to prepare the papers (and thus bear most of the costs), I will recommend to EI that we should not ask for our fees in connection with rectifying this violation of the Protective Order.

Please let us [know] at least as early as next Wednesday, November 18, 2009, if Square D will agree to this proposal and will prepare the court papers.

See Exhibit K.

16. On November 17, 2009, Square D acknowledged EI's November 13, 2009 letter in an email attached hereto as Exhibit L, stating:

We are double checking our options again. I will respond to your letter later today.

See Exhibit L.

17. Counsel for Square D did not respond as promised.

18. Between November 17 and December 3, counsel for EI repeatedly asked Square D's counsel to discuss its intentions regarding EI's proposal to move this Court jointly to enforce the Protective Order to expunge the Bingham Report from the Patent Office's files. As recently as December 3, at the Markman hearing, counsel for EI asked Square D's counsel to call to discuss EI's proposal. Counsel for Square D said he would call on Monday, December 7, 2009.

19. Counsel for Square D did not call EI's counsel on December 7, 2009.

20. Instead, in the evening on December 8, 2009, EI received a letter from Square D's counsel. In this letter, Square D flip-flops and reneges on its promised cooperation with EI to protect EI's confidential information. The letter also contradicts statements that Square D made to EI's counsel and, more importantly, to the Patent Office which acknowledged the confidentiality of the Bingham Report and its protection under the Protective Order. See paragraph 9 *supra*. Square D's December 8, 2009 letter is too long to quote in full. In summary, Square D's letter argues for the first time that:

- i. the Bingham Report is not adequately marked confidential as required by the Protective Order;
- ii. Square D will not join a motion for a court order to expunge the Bingham Report from the PTO's files because EI has not complied with the Protective Order;
- iii. Square D's agreement to petition the PTO to expunge was only a "courtesy" to EI and is withdrawn.

See Exhibit M, pp. 1-2.

21. Square D's December 8, 2009 letter also discloses that Square D has submitted

the Bingham Report in several other Square D applications and reexaminations in the Patent Office. *See* Exhibit M, p. 2, fn 1.³

ARGUMENT

22. There is no legitimate dispute that the source code disclosed in the Bingham Report is highly confidential information. The Protective Order expressly acknowledges that source code and firmware are among the types of information that the Protective Order regards as Confidential – Attorneys Eyes Only information. *See* Exhibit A, p. 3.

23. Likewise, there is no legitimate dispute that Square D knows the Bingham Report includes highly confidential information. Contrary to its self-serving letter of December 8, 2009 (*see* Exhibit M), Square D has made judicial admissions that the Bingham Report is subject to the Protective Order and has not been made public. Square D states expressly in the Petition to Expunge:

The information [the Bingham Report] that Petitioner/Patent Owner is petitioning to have expunged is subject to a protective order. Furthermore, the information that the Petitioner/Patent Owner is petitioning to be expunged has not been made public.

Exhibit H, p. 4.

24. Square D is legally responsible for those statements to the Patent Office. The Petition to Expunge is signed on Square D's behalf by its counsel of record in the '562 Reexamination as "Agent for Patent Owner" i.e. Square D. Exhibit H, p. 5.

³ On or about December 7, 2009, EI's litigation counsel received notice from the Patent Office that EI must respond in the Patent Office to the Petition to Expunge filed by Square D by December 12, 2009, the very day on which this Motion is noticed to be heard. Notably, Square D's stalling and the timing of Square D's letter reneging on its agreement to cooperate with EI to expunge the Bingham Report made it impossible for EI to have a motion heard any earlier than the very same day on which it is required to respond to the Patent Office. Unless EI responds, the Petition to Expunge will be dismissed as premature. Typically, a Petition to Expunge is entertained only after a reexamination has been concluded. By that time, which could be many months from now, EI's confidential information may have been compromised.

25. There is no excuse for Square D's dishonorable flip-flop. It led EI to believe that it was acting cooperatively to resolve an error that was of Square D's making. Its unilateral announcement that it will no longer cooperate is contrived to prejudice EI, which now has to scramble to protect its confidential source code. Square D knows better. It should be sanctioned for renegeing on its agreement with EI to cooperate to expunge the Bingham Report. Specifically, Square D should be ordered to reimburse EI for the cost of preparing this Motion and any costs that EI incurs going forward to expunge the Bingham Report from other applications or reexaminations in the Patent Office in which Square D has improperly submitted the Bingham Report.

26. The disclosure of information in violation of a protective order justifies sanctions. *Am. Nat'l Bank & Trust Co. v. AXA Client Solutions, LLC*, No. 00 C 6786, 2002 U.S. Dist. LEXIS 9511 at *3 (N.D. Ill. May 24, 2002) ("Upon entry of a protective order under Rule 26(c)... dissemination [of information] becomes controlled by the terms of the protective order and the parties must comply with the terms of the protective order or subject themselves to possible sanctions."). Those sanctions come in the form of attorney's fees and expenses payable to the party whose confidentiality has been compromised. *Id.* at *2.

27. The Court should also enter an Order directing the Patent Office to expunge pages 57-71 of the Bingham Report specifically from the '562 Reexamination and from any other prosecution or reexamination where it has been wrongly submitted. As EI understands it, the PTO legal advisor has invited Square D's counsel to obtain such an Order to rectify Square D's admitted error.

28. To the extent, if at all, that the Court believes that EI must formally re-designate pages 57-71 of the Bingham Report as CONFIDENTIAL UNDER PROTECTIVE ORDER

ATTORNEYS EYES ONLY per Section III. B. of the Protective Order, then the Court should grant EI such leave and order that the Bingham Report, pp. 57-71 is so re-designated. The Protective Order gives EI the unrestricted right to re-designate the Bingham Report. See Exhibit A, p. 4.

REQUEST FOR RELIEF

WHEREFORE, EI requests the following relief.

- A. An Order enforcing the Protective Order and directing the Patent Office to expunge pages 57-71 of the Bingham Report from all Patent Office records, whether in the '562 Reexamination or otherwise;
 - B. An Order directing Square D to reimburse EI's fees and costs incurred in seeking and obtaining expungement of pages 57-71 of the Bingham Report from the '562 Reexamination and all other prosecutions or reexaminations where the Bingham Report has been submitted by Square D including the fees and costs incurred in filing the instant Motion;
 - C. To the extent necessary, an Order re-designating the Bingham Report, pages 57-71 as "CONFIDENTIAL UNDER PROTECTIVE ORDER - ATTORNEYS EYES ONLY" under the Protective Order; and
 - D. Such other relief as the Court deems just.
- EI will submit a draft Order which it requests the Court to enter at the hearing on December 14, 2009.

Dated: December 9, 2009

By: /s/ Bradford P. Lyerla

Bradford P. Lyerla

Benjamin T. Horton

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233 South Wacker Drive

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(312) 474-6300

Counsel for Defendants

EI ELECTRONICS, INC. and

EI ELECTRONICS LLC

CERTIFICATE OF SERVICE

I, Bradford P. Lyerla, hereby certify that on this 9th day of December, 2009, I caused a copy of the foregoing MOTION FOR RELIEF FROM SQUARE D'S VIOLATIONS OF THE STIPULATED PROTECTIVE ORDER to be submitted electronically to the Court's Electronic Case Filing System which generates a Notice of Electronic Filing that constitutes service to all Filing Users under Fed. R. Civ. P. 5(b)(2)(D).

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/s/ Bradford P. Lyerla
Bradford P. Lyerla

EXHIBIT C

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

SQUARE D COMPANY,
POWER MEASUREMENT, INC., and
POWER MEASUREMENT, LTD.,

Plaintiffs,

- vs. -

E.I. ELECTRONICS, INC. and
EI ELECTRONICS, I.L.C.,

Defendants.

No. 06cv5079

District Judge
Samuel Der-Yeghiayan

Magistrate Judge
Arlander Keys

ORDER

THIS MATTER COMING ON TO BE HEARD on EI'S MOTION FOR RELIEF FROM
SQUARE D'S VIOLATIONS OF THE STIPULATED PROTECTIVE ORDER, the Court
hereby grants EI's *Motion*. This Court:

RECEIVED
41 PM 12/21/09
12-21-09

A. Directs the Patent Office to expunge pages 57-71 of the Bingham Report from all Patent Office records, specifically the '562 Reexamination as well as Applications 10/666,398; 11/274,705; 10/999,534; 11/899,769; 12/047,774 and Reexaminations 90/009,028; 90/009,006; 09/009,039.

AK
~~B. Directs Square D to reimburse EI's fees and costs incurred in seeking and obtaining expungement of pages 57-71 of the Bingham Report from the '562 Reexamination and all other applications and reexaminations where the Bingham Report has been submitted by Square D including the fees and costs incurred in filing the instant Motion;~~

C. To the extent necessary, Orders the re-designation of the Bingham Report, pages 57-71 as "CONFIDENTIAL UNDER PROTECTIVE ORDER ATTORNEYS EYES ONLY" under the Protective Order; and

D. Orders such other relief as the Court deems just.

Arlander Keys, 12/14/2009
Hon. Arlander Keys

Dec. 21. 2009 1:25PM

No. 2621

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DEC 21 2009

USDC Court (CH/ARP)

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United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Arlander Keys	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	06 C 5079	DATE	12/14/09
CASE TITLE	Square D Company et al v. E.I. Electronics, Inc.		

DOCKET ENTRY TEXT

Motion hearing held on Defendants' Motion to enforce its July 6, 2007 Stipulated Protective Order against Square D Company, Power Measurement, Inc. and Power Measurement, Ltd. ("Square D") and the United States Patent and Trademark Office. The motion is granted for the reasons stated on the record (#209). The Bingham Report is to be expunged in the filings made with the Patent Infringement Office, as stated on the record. The motion for sanctions is denied. *AK*

See attached order for further details.Decks to mail notices.06:12 nloc

Continuation Entry:	AC
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06C5079

Page 1 of 2